ORIGINAL

No. 94-1583.

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ODIE WASHINGTON, Director, Illinois Department of Corrections, in his official capacity,

Petitioner,

v.

MICHAEL BARGER and RICHARD MABZ, individually and on behalf of all others similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of an Illinois statutory amendment that entirely eliminates prisoners' opportunity to earn enhanced educational good conduct credit--when the prisoners were eligible to earn such credit under the law in effect at the time they committed the offenses for which they are incarcerated--violates the United States' Constitutional prohibition against ex post facto laws?

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ARGUMENT: REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

On November 19, 1993, Respondents filed this class action in the Circuit Court of Cook County challenging Petitioner's application to them of a 1993 statutory amendment--Illinois Public Act ("P.A.") 88-311 (Pet. Br. App. pp. 16-19)--that entirely eliminates their opportunity to earn the enhanced educational good conduct credit (day-for-day good conduct credit multiplied by 1.25) for which they were eligible--pursuant to P.A. 86-1373 (Pet. Br. App. pp. 20-22)--at the time they committed the offenses for which they are incarcerated.[1] Respondents alleged that subjecting them and others similarly situated to the statutory amendment to P.A. 86-1373--P.A. 88-311--and the Rules promulgated thereunder violated their rights under the ex post facto clauses of the Illinois (art. I, § 16) and United States (art. I, § 10) Constitutions. The persons rendered ineligible to earn enhanced educational good conduct credit included both prisoners in an Illinois Department of

---

[1] The reason why the Illinois legislature enacted a retrospective amendment that took away from Respondents the opportunity to earn enhanced educational good conduct credit is likely the same reason rejected in Devine v. New Mexico Dep't of Corrections, 866 F.2d 339, 344 (10th Cir. 1989):

> In our view, it is potentially as arbitrary and vindictive to retroactively enhance punishment for particular conduct, as it is to make particular conduct criminal. The desire to require certain classes of offenders to spend more time in prison is indistinguishable from the desire to make certain past conduct criminal. It has its roots in the same phenomenon--increased disapproval of particular conduct; and it has the same effect--requiring individuals to suffer greater punishment than previously mandated.

Corrections ("IDOC") educational program who, prior to the effective date of the amendment, had been earning enhanced educational good conduct credit, and prisoners awaiting entry into an educational program. Although Respondents continued to be placed in IDOC educational programs, they were no longer eligible to earn enhanced educational good conduct credit.

On February 8, 1994, the Circuit Court of Cook County entered a final order: 1) declaring that application of P.A. 88-311 to Respondents so as to deprive them of the opportunity to earn enhanced educational good conduct credit violated the Illinois and United States Constitutions, and 2) enjoining Petitioner from applying P.A. 88-311 and the Rules promulgated thereunder to Respondents so as to deprive them of the opportunity to earn enhanced educational good conduct credit. (Pet. Br. App. pp. 12-14).

On December 22, 1994, the Illinois Supreme Court affirmed the order of the Circuit Court of Cook County. Barger v. Peters, 645 N.E.2d 175 (1994). Contrary to Washington's claim that the Illinois Supreme Court held that "any reduction in the scope of the [educational] program would violate the ex post facto clause for those adversely affected" (Pet. Br. p. 8), the Illinois Supreme Court held only that application of P.A. 88-311 to Respondents so as to deprive them of the opportunity to earn the enhanced educational good conduct credit for which they were eligible at the time they committed the offenses for which they are incarcerated violated the ex post facto clauses of the Illinois and United

States Constitutions. Id. at 177-178.

On March 22, 1995, Washington filed his Petition for Writ of Certiorari with this Court. Only the Federal Constitutional claim is before this Court.

Because this case involves no new question of law but rather is consistent with decisions of this Court, with decisions of the federal appellate courts, and with decisions of the highest sister state courts, and because this case affects a limited and ever-decreasing number of persons, this Court should not revisit the well-settled issues raised in this litigation. Washington's Petition for Writ of Certiorari should be denied.

II. THE DECISION OF THE ILLINOIS SUPREME COURT THAT APPLICATION OF AN ILLINOIS STATUTORY AMENDMENT THAT ENTIRELY ELIMINATES PRISONERS' OPPORTUNITY TO EARN ENHANCED EDUCATIONAL GOOD CONDUCT CREDIT--WHEN THE PRISONERS WERE ELIGIBLE TO EARN SUCH CREDIT UNDER THE LAW IN EFFECT AT THE TIME THEY COMMITTED THE OFFENSES FOR WHICH THEY ARE INCARCERATED--VIOLATES THE UNITED STATES' CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. Washington Has Misstated the Issue in This Case.

Washington has failed to state correctly the issue in this case. (Pet. Br. pp. 7-8). Contrary to his assertion, Respondents do not challenge the state's right to experiment with "incarceration programs." (Pet. Br. p. 8). Furthermore, Respondents do not challenge Washington's discretion whether or not to place a prisoner in an educational program, his discretion whether or not to terminate a particular educational program because of limited "fiscal resources appropriated by the General

Assembly for such purpose" (P.A. 86-1373 and P.A. 88-311), nor his discretion whether or not a particular Respondent has satisfactorily completed an IDOC educational program. Respondents challenge only application of P.A. 88-311 to them so as to deprive them of the opportunity to earn enhanced educational good conduct credit upon successful completion of an IDOC educational program.

In fact, the IDOC educational program continues in operation just as it did at the time Respondents committed the offenses for which they are incarcerated, and the IDOC continues to place Respondents in these programs. The only difference is that Respondents are no longer eligible to earn enhanced educational good conduct credit because of the retrospective application to them of P.A. 88-311. For example, Respondent Barger was attending an educational program and receiving enhanced educational good conduct credit for successful completion of the program's requirements on August 10, 1993. He continued in the same educational program, but effective August 11, 1993, he was no longer eligible to receive--and did not receive--enhanced educational good conduct credit upon his successful completion of the program. Barger's experience is typical of the experience of the members of the plaintiff class.

B. The Decision of the Illinois Supreme Court Is Consistent With Applicable Decisions of This Court.

The Illinois Supreme Court correctly grounded its decision in Barger on this Court's decisions in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Beazell v. Ohio, 269 U.S. 167 (1925); Weaver v.

Graham, 450 U.S. 24 (1981); and Collins v. Youngblood, 497 U.S. 37 (1990). Barger, 645 N.E.2d at 176-177. Washington's assertion that Barger conflicts with these decisions is simply wrong.

Calder, the foundation stone of ex post facto case law, held that a retrospective law that "inflicts a greater punishment, than the law annexed to the crime, when committed" violates the constitutional prohibition against ex post facto laws. Calder, 3 U.S. (3 Dall.) at 390. In Beazell, this Court stated: "It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute...which makes more burdensome the punishment for a crime, after its commission" violates the ex post facto clause of the United States Constitution. Beazell, 269 U.S. at 169.

Citing, inter alia, Calder, this Court held in Weaver that a statutory change in Florida's formula for calculating "gain-time" credit which "disadvantaged" prisoners violated the ex post facto prohibition of art. I, § 10 of the United States Constitution. Weaver, 450 U.S. at 29, 33. The Florida statute in place at the time Weaver committed the offense for which he was incarcerated provided that prisoners would earn gain time credit if they committed no violations of administrative rules and regulations or of state laws and performed assigned work, duties, and tasks "in a faithful, diligent, industrious, orderly and peaceful manner." Weaver, 450 U.S. at 26. Contrary to Washington's assertion (Pet. Br. p. 11), the award of gain time was not automatic, but rather was awarded only for good behavior. Id.

The Florida legislature subsequently amended the formula for awarding gain time to reduce significantly the amount of gain time prisoners could earn, thereby lengthening the period of their incarceration. Id. Weaver held that the application of the amendment to prisoners who committed prior to the amendment the offenses for which they were incarcerated was a retrospective increase in punishment, one of the categories of ex post facto laws proscribed in Calder. Id. at 35-36; Calder, 3 U.S. (3 Dall.) at 390.

In reaching its decision in Weaver, this Court understood full well that prolonged incarceration is "punishment", and it is in that sense that this Court held that retrospective application of the amended law "disadvantaged" Weaver. See People v. McVickers, 840 P.2d 955, 957 (Cal. 1992) (stating that "there is little dispute that additional jail time or extra fines are punishment") (citing Weaver). In Barger, it is undisputed that Respondents' period of incarceration has been or could be lengthened as a result of application to them of P.A. 88-311.

The facts of Weaver are directly on point with the facts of this case. In Weaver, the award of gain time depended on prisoners' good behavior and satisfactory job performance. Weaver, 450 U.S. at 26. In this case, the award of enhanced educational good conduct credit depends on the satisfactory completion of the educational program to which a prisoner may be assigned. P.A. 86-1373 and P.A. 88-311. That assigning a prisoner to an educational program requires the exercise of Washington's

cretion is irrelevant to the ex post facto analysis. As Weaver ted, "a law need not impair a 'vested right' to violate the ex st facto prohibition." Weaver, 450 U.S. at 29.

Washington argues that this Court's decision in Collins v. ungblood, 497 U.S. 37 (1990) effectively overrules Weaver. (Pet. . pp. 11-13). In light of the issue in Collins--reformation of improper jury verdict--and the proceedings before this Court, shington's argument is frivolous. In Collins, this Court viewed the long history of ex post facto case law and pecifically overruled two cases--Kring v. Missouri, 107 U.S. 221 1883) and Thompson v. Utah, 170 U.S. 343 (1898), but not Weaver. ollins in no way undermines the validity of the Weaver analytic ramework, which is consistent with Calder.[2]

Barger does not conflict with any decision of this Court. On he contrary, the decision of the Illinois Supreme Court in Barger s consistent with all relevant decisions of this Court.

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[2] All parties in Collins recognized the continuing validity of Weaver. Indeed, in his opening brief, Petitioner Collins, Director of the Texas Department of Criminal Justice, stated:

> More recently, in both Weaver v. Graham and Miller v. Florida, the Court found a constitutional defect in the retroactive application of changes in the law that increased the amount of time prisoners must serve before achieving eligibility for parole. In both cases, the Court recognized that the change in law effectively added to the punishment that was prescribed at the time when the crime was consummated. Miller, 482 U.S. at 433-34; Weaver, 450 U.S. at 33. Again, the results reached are in harmony with Calder.

Petitioner's Brief at 20, Collins, 497 U.S. 37 (1990).

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gain time--basic and incentive--"a prisoner must satisfy certain conditions [and]...[i]n both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time." Id. at 1499. Consequently, the court held that retrospective application of a reduction in the amount of incentive gain time that a prisoner could earn violated the prohibition against ex post facto laws. Id. at 1502.

The situation in Raske is virtually identical to that of the Respondents in Barger: the IDOC has discretion to decide whether to maintain educational programs, whether to assign prisoners to those programs, and whether a particular prisoner has completed the program satisfactorily. P.A. 86-1373. But this IDOC discretion is irrelevant to ex post facto analysis. What is key, and what the Eleventh Circuit recognized, is "whether a prisoner is 'disadvantaged by the reduced opportunity to shorten his time in prison.'" Id. at 1500 (citing Weaver, 450 U.S. at 33-34) (emphasis in original). There is no question that Respondents in this case, like the prisoners in Raske, have lost absolutely the opportunity to shorten their time in prison by successful completion of IDOC educational programs because of the retrospective application to them of P.A. 88-311.

Washington argues that the Florida case of Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995), recently decided by the Eleventh Circuit, is inconsistent with the Illinois Supreme Court's decision in Barger. (Pet. Br. pp. 9-10). Washington is wrong. In Hock,

the Eleventh Circuit distinguished Florida's basic and incentive gain time statutes at issue in Raske, 876 F.2d at 1499, 1500, on the one hand, from the Florida "control release" statute involving the award of "provisional credits", on the other hand, that automatically took effect whenever the population of the Florida Department of Corrections ("DOC") exceeded a set percentage of capacity. The court held that a reduction in the amount of basic and incentive gain time that a prisoner could earn violated the constitutional prohibition against ex post facto laws, but that retrospective application of the control release/provisional credits statute did not. Hock, 41 F.3d at 1472. The court reasoned that the Florida control release/provisional credits statute, unlike the basic and incentive gain time statutes, reduced the period of incarceration "automatically for the convenience of the [Florida] Department of Corrections." Id. Execution of the control release statute was totally independent of prisoners' institutional behavior: they could neither earn nor forfeit eligibility for control release. The Florida Supreme Court's approach to these statutes--basic and incentive gain time, on the one hand, and control release, provisional credits/administrative gain time, on the other hand--is precisely that of the Eleventh Circuit. See discussion infra pp. 14-16.

In support of his argument that Hock conflicts with Barger, Washington argues that the Illinois General Assembly enacted the educational good conduct credit statute to reduce overcrowding, so that comparable to the control release/provisional credits statute

at issue in Hock, retrospective application of P.A. 88-311 to Respondents is not ex post facto. (Pet. Br. p. 8). Washington's argument is at best grounded in an erroneous premise. P.A. 86-1373 was not enacted to relieve overcrowding, but rather to provide an incentive for prisoners to earn early release through good behavior and to increase the likelihood of their post-release success in the free community. See Illinois Task Force on Crime and Corrections, Part II: Recommended Programs to Reduce Recidivism, Chapter 4: Earned-Time Credit Program, in Final Report 25, 27 (1993) (Resp. Br. App. pp. A-1, A-3).

Furthermore, Washington's claim makes no sense. If P.A. 86-1373 was enacted to relieve overcrowding, it would be nonsensical to continue Respondent Barger and the other Respondents in IDOC educational programs: they are taking up limited educational slots but are not shortening their prison time and, therefore, are not relieving overcrowding. However, Barger and the other Respondents continue to be placed in IDOC educational programs. They just no longer earn enhanced educational good conduct credit.

In Wallace v. Cody, 951 F.2d 1170, 1171-1172 (10th Cir. 1991), the court agreed with the Oklahoma state appellate court that any change in the state's earned credit statute that disadvantaged--through prolonged incarceration--prisoners who committed the offenses for which they were incarcerated prior to the effective date of the change violated the prohibition against ex post facto laws. The court remanded the case to the district court for a determination whether the particular petitioner for a writ of

habeas corpus was in fact disadvantaged, i.e., subjected to prolonged incarceration, by the statutory amendment and, if so, for a recalculation of his earned credits. Id.

Petitioner believes that the federal appellate case of California Dep't of Corrections v. Morales, 16 F.3d 1001 (9th Cir.), cert. granted, ___ U.S. ___, 115 S.Ct. 40 (1994), currently pending before this Court, is "significantly related" to Barger. (Pet. Br. p. 9, n.2). Contrary to his assertion, the facts and judicial history of Morales differ significantly from those of Barger. The California Supreme Court and the Eleventh Circuit Court of Appeals differed as to whether retrospective application of a disadvantageous change in the frequency of parole hearings violated the constitutional prohibition against ex post facto laws. Compare In re Jackson, 703 P.2d 100, 105 (Cal. 1985) with Morales, 16 F.3d at 1004. The California Supreme Court had held that the change in frequency of parole hearings was merely procedural and therefore not a prohibited ex post facto law while the Ninth Circuit Court of Apppeals held that the change was substantive and did violate the constitutional prohibition against such laws. The analogous situation in Illinois is quite different. In Tiller v. Klincar, 561 N.E.2d 576 (1990), cert. denied, 498 U.S. 1031 (1991), the Illinois Supreme Court, unlike the California Supreme Court in Jackson, determined that a reduction in the frequency of parole hearings did violate the Illinois and Federal Constitutional prohibitions against ex post facto laws. Unlike Morales, there is no conflict in Barger between a decision of the Illinois Supreme

Court and a federal appellate court.

Barger is consistent with all relevant decisions by the federal appellate courts. Each of these decisions correctly follows Calder and its progeny, as does Barger.

2. State Supreme Court Decisions.

The Barger decision is also consistent with all relevant decisions of the highest courts of sister states. There are no state court cases that conflict with Barger and a number of cases directly on point in accord.

Washington's policy argument that Barger somehow interferes with the ability of Illinois and other states to design innovative programs to reduce recidivism misses the point of this litigation. (Pet. Br. p. 8). Respondents do not argue that the Illinois General Assembly could not have changed its collective mind, enacted P.A. 88-311, and applied it prospectively, i.e., to persons who committed on and after August 11, 1993 the criminal acts for which they would be incarcerated. Such a limitation would have prevented Illinois from running afoul of the constitutional prohibition against ex post facto laws. Unfortunately, the Illinois General Assembly failed to do so, and that failure violates the constitutional prohibition against ex post facto laws.

Contrary to Washington's assertion that Barger will cause confusion, all of the highest courts in the states which have wrestled with issues analogous to that presented by Barger are consistent with Barger. (Pet. Br. p. 9). For example, the Florida Supreme Court in Waldrup v. Dugger, 562 So. 2d 687, 692 (Fla. 1990)

held that retrospective application of a change in the incentive gain time statute constituted a violation of the constitutional prohibition against ex post facto laws because such application could have the effect of increasing the prisoner's period of incarceration. Incentive gain time was awarded only to inmates who performed "satisfactory and acceptable" work. Id. at 689. The incentive gain time at issue in Waldrup is indistinguishable from the enhanced educational good conduct credit at issue in Barger.

In Waldrup, just as in Barger, the state argued that incentive gain time was a "mere expectancy" dependent on the discretion of the Florida DOC and therefore not subject to the prohibition against ex post facto laws. Waldrup, 562 So. 2d at 692. To the state's argument, the court responded:

> Indeed, the argument advanced by the state sounds very much like the discredited analysis employed by this Court in Harris v. Wainwright, 376 So. 2d 855 (Fla. 1979)...[which] [t]he United States Supreme Court in Weaver directly overruled....
>
> ....
>
> ...Weaver applies as fully to discretionary gain-time as it does to 'mandatory' gain-time....Even the 'grace' of the legislature, once given, cannot be rescinded retrospectively.

Id.

Just as the Eleventh Circuit in Hock distinguished the ex post facto implications of Florida's basic and incentive gain time statutes, on the one hand, from its control release/provisional credits/administrative gain time statute, on the other hand (see discussion supra pp. 9-11), so also has the Florida Supreme Court. Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994), and Dugger v.

The Illinois Task Force on
Crime and Corrections

Final Report

Anton R. Valukas
Chairman

March 1993

Earned-Tin Credit Prograr

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A principal reason why Illinois prisons are as crowded as they are today, and why crowding gets worse with time, is recidivism. As noted in the Introduction, research, in Illinois and other states, confirms that a sizeable percentage of inmates released from prison today — as many as 46 out of every 100 — will be back behind bars within three years.

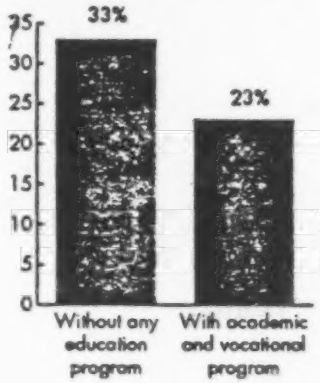
Research also suggests that recidivism can be reduced (and employment levels increased) among offenders who participate in meaningful educational and work programs while they are incarcerated. In a 1988 study, the Illinois Council on Vocational Education found that nearly one-third of inmates who did not participate in any educational programs while in prison were rearrested within one year of their release. But for inmates who received both academic and vocational training, the rearrest rate was substantially lower — 23 percent.

The success of vocational training is also borne out by research at the federal level. The Post-Release Employment Project (PREP), a study by the Bureau of Prisons' Office of Research and Evaluation, supports the view that prison training programs have a positive impact on participants. Initial PREP results indicate that inmates who receive vocational training and experience during their incarceration are less likely to receive misconduct reports in prison, more likely to be employed during their halfway house stay and after release, and less likely to recidivate than similar inmates who are not trained during their imprisonment.

To take advantage of these successes, Illinois implemented an education earned-time credit program in 1991. This program rewards inmates who enroll in full-time academic or vocational classes and who meet specific educational goals: for every four days an inmate participates in an educational program, his or her prison stay is reduced by an additional one day. Experience with the education earned-time credit in Illinois demonstrates the potential of the Earned-Time Credit concept. Since its implementation over two years ago, a total of 10,441 education earned-time credit awards have been received (an inmate may receive more than one award). The average award amount is 21 days per inmate. Inmates who want to participate in the current program express their interest to the education department at the institution. Depending on the inmate's academic abilities and availability of classes, he or she is placed in the appropriate class or — and this presents a problem that will have to be resolved — on a waiting list.

Currently more than 8,800 adult inmates and 1,400 youths in 35 correctional institutions are served monthly by School District 428, the Department of Corrections' own school district. Most of these participants are attending an academic course. During FY92, 64 different vocational programs were made available to inmates. The Department of Corrections contracts with community and four-year colleges for vocational and higher education programs. In FY92, 1,935 GED certificates, 2,654 vocational

Percentage of Illinois inmates released from prison who were rearrested within one year



Degrees and certificates earned by inmates during fiscal 1992

GED	1,935
Vocational certificates	2,654
Associate degrees	368
Bachelor degrees	91

activities for which credit is given must be expanded substantially so that waiting lists are eliminated and all eligible inmates can have access to these activities soon after their arrival at a penitentiary. If the Department's experience with the education earned-time credit holds, a broader system of earned-time credits — based on strong incentives and backed up by sufficient program capacity — should reduce recidivism and ultimately reduce correctional crowding and costs.[1]

Recommendation 1

Expand the Earned-Time Credit Program to include participation in correctional industries and substance abuse education and treatment activities, and increase the amount of earned-time credit an inmate can earn.

This recommendation would change the current statute authorizing the Department of Corrections to give earned-time credits, 730 ILCS 5/3-6-3. Specifically, the statute should be amended to:

1. Allow inmates participating in correctional industries and drug education and treatment programs, as well as in educational and vocational programs, to earn credit upon successful completion of those programs.
2. Increase the amount of earned-time credit awarded from .25 days to .5 days.
3. All inmates would be eligible for the Earned-Time Credit Program *except* for: (a) inmates assigned to mental health units, boot camps, and electronic detention; and (b) inmates serving sentences for any of the following offenses (or any predecessor or successor offenses with the same or substantially the same elements):
   - First-Degree Murder, 720 ILCS 5/9-1;[2]
   - Criminal Sexual Assault, 720 ILCS 5/12-13;
   - Aggravated Criminal Sexual Assault, 720 ILCS 5/12-14;
   - Criminal Sexual Abuse, 720 ILCS 5/12-15;
   - Aggravated Criminal Sexual Abuse, 720 ILCS 5/12-16;
   - Aggravated Battery with a Firearm, 720 ILCS 5/12-4.2;
   - Bringing Contraband into, or Possessing Contraband in, a Penal Institution (relating solely to firearm, firearm ammunition, or explosive contraband), 720 ILCS 5/31A-1.1(j);
   - Any "Super-X" Drug Offense, 720 ILCS 570/401(a)(1)(B), (C), (D); 401(a)(2)(B), (C), (D); 401(a)(3)(B), (C), (D); 401(a)(7)(B), (C), (D);
   - Calculated Criminal Drug Conspiracy, 720 ILCS 570/405; and
   - Inchoate offenses relating to the foregoing offenses (where applicable), 720 ILCS 5/8-1, 5/8-1.1, 5/8-1.2 (Solicitation); 5/8-2 (Conspiracy); and 5/8-4 (Attempt).[3]

Rationale

Currently, inmates enrolled full-time in the Department of Corrections' educational and vocational programs who are improving literacy or satisfactorily completing other academic or vocational training programs receive .25 days of credit for each day of program participation. This credit is in addition to other forms of good-time credit (see the Addendum to this Chapter, Page 31, for more information on good-time). Inmates convicted of Murder or a Class X felony, and those who have previously participated in the program and are subsequently convicted of a felony, are not eligible under the current law.

This recommendation will create an expanded Earned-Time Credit Program that will allow more inmates to earn credit for a broader range of institutional activities; in addition to the current educational/vocational programs, participation in substance abuse education and treatment and correctional industries will also result in accumulating earned-time. The amount of earned-time will also be increased from .25 days to .5 days. The goal of these changes is to provide an incentive to inmates to participate in a broader range of meaningful activities that will increase the likelihood of their success after release, and thereby reduce their chances of returning to prison.

Recommendation 2 **Expand the number of educational, correctional industries, and substance abuse education and treatment programs to accommodate the recommended Earned-Time Credit Program, and provide the Department of Corrections with sufficient additional staff to safely and successfully implement and run these expanded activities.**

Rationale

The key to successful implementation of an expanded Earned-Time Credit Program in Illinois is providing sufficient high-caliber educational, vocational, substance abuse education and treatment, and correctional industries programs for inmates, with an ongoing commitment of the resources necessary to sustain these programs. While the Department of Corrections currently provides a variety of programmatic and work opportunities for inmates, these offerings are not sufficient to support existing demand, and could not sustain an expanded Earned-Time Credit Program.[4] An expansion of the Department of Corrections' Earned-Time Credit Program will require an equally significant expansion and enhancement of in-prison programs and assignments.

Throughout the nation, correctional systems are faced with the same challenge, allocating scarce resources to in-prison programs, while meeting the more basic and critical requirements of security, clothing, housing, and medical care. Quite often, educational and treatment programs are shortchanged in the competition. Unfortunately, these are the programs that offer the best opportunity to help reduce the probability of inmates returning to prison.

For example, in the Department of Corrections today, there are approximately 5,000 inmates assigned to general laborer duties, which include cellhouse help, runners, lawn workers, laundry handlers, and janitors. If more meaningful assignments in correctional industries or in educational and treatment programs were available, many of these inmates could use their time more productively, while receiving earned-time credit. The Task Force is recommending the expansion of Illinois' Correctional Industries (ICI) program to allow more inmates to participate in meaningful and beneficial work assignments (see Chapter 10). Currently 1,300 inmates are involved in ICI, learning job skills and work habits that are transferable to the community when released.

If more meaningful assignments in correctional industries or in education and treatment programs were available, many of the 5,000 "general laborer" inmates could use their time more productively.

Similarly, the Department's School District 428, which is the third largest school district in the State, currently serves over 8,800 inmates monthly, most of whom are enrolled in academic courses. While every Department of Corrections institution provides some type of academic and vocational programs for inmates, because of budget cuts, only 31 percent of the total institutional population is being served by School District 428. Four out of every five inmates surveyed at the time of admission to the Department of Corrections indicate they want to enroll in an educational program, but only one in three actually enrolls. One of the primary reasons cited was the long waiting lists for popular courses.

The Department's treatment programs, including substance abuse and mental health programs, are also limited and serve only a small portion of the inmates who require assistance. Currently, there are three in-prison residential drug treatment programs funded by either the Department of Alcoholism and Substance Abuse or the Illinois Criminal Justice Information Authority. These programs provide individual and group counseling to 45 inmates at Graham Correctional Center, 45 inmates at Sheridan Correctional Center, and 32 inmates at Dwight Correctional Center. Although it is estimated that approximately 70 percent of the Department's inmate population have a reported history of substance abuse, treatment programs currently serve less than 1 percent (244) of the 32,000 inmates now in prison. As recommended in Chapter 5 of this Report, a 500-bed pre-release drug treatment program should be implemented by the Department of Corrections to serve approximately 1,000 inmates annually as an initial step toward meeting the broader treatment needs of offenders.

Recommendation 3

The Director of Corrections should be directed to provide regular biennial reports on the Earned-Time Credit Program to the Governor and General Assembly, and should be authorized to request the General Assembly and the Governor to add to the list of programs for which earned-time credit is given.

The Earned-Time Credit Program is designed to encourage inmates to simultaneously "earn their way out" and "learn to stay out."

Rationale

The Earned-Time Credit Program is designed to reduce prison crowding not by letting inmates out early, but by encouraging them to improve themselves as a means to simultaneously "earn their way out" and "learn how to stay out." To this end, the Task Force has selected three programs (education, correctional industries, and substance abuse education and treatment) because research suggests that participation in these programs reduces recidivism. This recommended reporting requirement will enable the General Assembly and Governor to determine whether these programs have this salutary effect. In the unlikely event that they do not, then the Earned-Time Credit Program should be reassessed.

If, as we anticipate, however, there is a statistically significant reduction in recidivism among participants, the Director should be encouraged to try to expand the Earned-Time Credit Program to include other activities and programs that have demonstrated the ability to reduce recidivism. For example, it may be that credit could be given for certain institutional work assignments that require the development and use of skills that would assist an inmate in finding a job in the community upon release (for example, in carpentry, plumbing, or heating/air conditioning repair). Similarly, there may be a program or programs specifically designed to address issues unique to female offenders that might reduce their recidivism levels.

Finally, the Director should use this biennial report to inform the Governor and General Assembly of the adequacy of funding and staffing for the anti-recidivism activities that form the basis for the Earned-Time Credit Program. Given the importance of these activities to this program, and the importance of this program to the overall response to prison crowding, this reporting function will be of crucial importance. The Task Force believes that the State will be best served by establishing regularly scheduled formal communications between the Director and the Governor and General Assembly in regard to the Earned-Time Credit Program.

Population and Cost Impact

Modification to statutory eligibility criteria	Program expansion needed	Population reduction		Gross cost savings		Program expansion costs
		Year 1	Year 3	Year 1	Year 3	
1. Increase the amount of earned-time an inmate may earn and make correctional industries programs and substance abuse education/treatment programs eligible for earned time.	None	794	1,525	$2,495,542	$4,793,075	None
2. Expand the number of educational, correctional industries, and substance abuse education/treatment programs by 5,000.	5,000	1,498	2,881	$4,708,214	$9,054,983	$6,922,000*

* Program costs include expansion of educational, substance abuse education/treatment, and correctional industries programs. Cost estimate of $2.5 million to expand new programs for correctional industries requires increased expenditure authority for Illinois Correctional Industries but does not increase the Department's operating budget and is not included here as a program cost. Expense for residential drug treatment program is included in Chapter 5.

Addendum

Current Good-Time Credit Program

Like most states, Illinois has a statutorily authorized good-time program for inmates incarcerated in state prison. *Good-time*, which reduces an inmate's period of incarceration for good conduct, has become an important and necessary population management tool for prison systems throughout the country. For example, most inmates sentenced to the Illinois Department of Corrections for 10 years, will actually serve less than five, a fact understood by judges, prosecutors, defense counsel and other participants in the criminal justice system, including offenders. Even with these good-time credits, however, inmates convicted of the most serious crimes in Illinois today are serving longer sentences than similar offenders convicted under the previous indeterminate sentencing structure.

Illinois' Unified Code of Corrections (730 ILCS 5/3-6-3) sets forth the provisions by which offenders receive good-time credits from the Illinois Department of Corrections. According to these provisions, the Department of Corrections is authorized to provide offenders with the following good-time credits, subject to review by the Prisoner Review Board:

1. *Good-conduct credit (day-for-day good-time)*: Provides one day of good-conduct credit for each day of service in prison other than where a "natural life" sentence has been imposed. Each day of good-conduct credit reduces by one day the inmate's period of incarceration.
2. *Meritorious good-conduct credit (meritorious good-time)*: Authorizes the Director of Corrections, as deemed appropriate, to award up to 90 days good-conduct credit to inmates for meritorious service, in addition to day-for-day good-time.
3. *Supplemental meritorious good-conduct credit (supplemental meritorious good-time)*: Added as an amendment to the meritorious good-conduct provision in 1990. Allows the Director of Corrections to provide eligible inmates with an additional 90 days good-time, essentially doubling the meritorious good-conduct credit for eligible inmates. Inmates convicted of certain serious crimes, including first-degree murder, reckless homicide while under the influence of alcohol or drugs, kidnapping, criminal sex offenses, and offenses against children are not eligible for this credit.
4. *Educational credit (earned good-time)*: Provides that inmates participating full-time in approved Department of Corrections educational/vocational programs aimed at improving literacy or satisfactorily completing other academic or vocational programs shall receive 1.25 days of good-conduct credit for each day of program participation. (Actually, this credit of .25 days is added to the day-for-day good-time.)

This statute also empowers the Prisoner Review Board to order that an inmate serve up to one year of the sentence imposed by the court which was not served due to the accumulation of good-conduct credits.

Illinois' Good-Time Credit Program Defined

Good-conduct credit: Provides one day of good-conduct credit for each day of service in prison other than where a "natural life" sentence has been imposed.

Meritorious good-conduct credit: Authorizes the Director of Corrections to award up to 90 days good-conduct credit to inmates for meritorious service, in addition to day-for-day good-time.

Supplemental meritorious good-conduct credit: Allows the Director of Corrections to provide eligible inmates with an additional 90 days good-time, essentially doubling the meritorious good-conduct credit for eligible inmates.

Educational credit: Inmates participating full-time in approved Department of Corrections educational/vocational programs receive 1.25 days of good-conduct credit for each day of program participation (credit of .25 days added to day-for-day good-time).

Impact and Implications of Good-Time

While simple good-time programs have become widely recognized as an effective and necessary inmate management tool, these programs are not without controversy. In many cases, the public perception is that good-time for offenders can jeopardize public safety, undermine the general effectiveness and deterrent effect of corrections, and breed disrespect for the criminal justice system.

Recent evaluations found that Illinois' meritorious good-time programs had a significant impact on reducing prison population growth, but little or no negative impact on public safety.

Despite these criticisms, extensive research and evaluations of these strategies in Illinois and elsewhere have found that, when properly administered, they are safe and effective prison population management tools. Evaluations of Illinois' meritorious good time (MGT) and supplemental meritorious good time (SMGT) programs conducted by the National Council on Crime and Delinquency (NCCD) found that MGT and SMGT were safe and cost-effective methods for alleviating prison crowding in Illinois. NCCD recommended that these programs not only be retained, but also be expanded.

Data collected by NCCD on Illinois' MGT and SMGT programs portray their significant impact on Illinois' prison population growth. NCCD found that since its implementation in 1980, Illinois' MGT program had reduced the projected inmate population by almost 10 percent. More specifically, between 1980 and 1984, over 5,900 "prison years" were averted through use of MGT. In terms of corrections and criminal justice expenditures during this same time frame, the MGT program saved the State nearly $49 million in prison operating costs.

Similarly, NCCD's 1991 evaluation of Illinois' SMGT program found that by the end of the fiscal year 1992, the SMGT program had reduced the Department of Corrections' projected prison population by 2,766 inmates. According to NCCD, the projected combined effect of the MGT and SMGT programs will be to reduce Illinois' projected prison population by 8,200 inmates from what it would have otherwise been in the year 2000.

NCCD's evaluation also found that Illinois' MGT and SMGT programs had little or no negative impact on public safety. The study found that recidivism rates for inmates released under the MGT and SMGT programs were essentially the same as for other releasees. Only one-half of 1 percent of all reported crimes could be attributed to the MGT and SMGT programs.

Notes

[1] The Task Force also acknowledges the efforts of private and religious groups who operate privately funded programs that assist in reducing recidivism. For constitutional, legal, and practical reasons, these programs are not a part of the Earned-Time Credit Program, but the Task Force notes that many of these groups have had a successful record in reducing recidivism. The Task Force applauds their efforts and urges these private groups to continue to work to reduce recidivism with inmates and releasees.

[2] The Task Force had considerable discussion concerning whether persons convicted of Second-Degree Murder, 720 ILCS 5/9-2, should be eligible for the Earned-Time Credit Program. Recognizing the seriousness of the offense, we also recognize very strong arguments for including persons convicted of Second-Degree Murder in the Earned-Time Credit Program. We note, for example, that Second-Degree Murder is a Class 1 felony and is probationable, and that victims of domestic violence who kill an abusive partner may be convicted of this offense. We urge the General Assembly to give careful consideration to this issue.

[3] There are other violent Class X crimes that the General Assembly may wish to consider excluding from this program, including Aggravated Arson, 720 ILCS 5/20-1.1, Aggravated Kidnapping, 720 ILCS 5/10-2, and Home Invasion, 720 ILCS 5/12-11. The Task Force urges the General Assembly to be specific in its selection of exclusions, because there are Class X offenders, particularly those convicted of drug offenses, and perhaps some three-time Class 1 or 2 offenders, who stand to benefit greatly from the substance abuse treatment and other anti-recidivism aspects of this program.

[4] The current education earned-time statute, 730 ILCS 5/3-6-3, has a provision that releases the Department of Corrections from liability because of an inability to provide sufficient educational program resources. The Task Force recommends expanding the scope of this statute by adding the bracketed (or similar) language:
"The inability of any inmate to become engaged in any such educational [, correctional industries, substance abuse, or other] program [for which earned-time credit is given] by reason of insufficient program resources or for any other reason established under the rules and regulations of the Department shall not be deemed a cause of action under which the Department or any employee or agent of the Department shall be liable for damages to the inmate."
730 ILCS 5/3-6-3(a)(4).